IN THE

Supreme Court of the United States

October Term, 1976
No. 76-364

CHARLES EDWARD WOODRUFF, JAMES GILHOOLEY, EAST BAY MODEL ENGINEERS SOCIETY, INC.,

Petitioners,

vs.

AIR PROPERTIES G., INC., THE HONG KONG BANK OF CALIFORNIA, REPUBLIC NATIONAL BANK AND TRUST COMPANY, a National Banking Institution, LAND DATA RESEARCH COMPANY, RONALD W. CURRAN, BYRON H. CUNNINGHAM, MARTIN ACKERMAN, C. N. HISLOP, JR., FIRST AMERICAN TITLE INSURANCE COMPANY, LAND DATA INVESTMENTS, INC., GARY MARTIN, ADAMS PROPERTIES, INC., WELLWOOD BEALE, AIR FARMS NW 80, LTD., SAVERS EQUITY FUNDING CORPORATION, JOEL BERGER, PRO LAND DATA ASSOCIATES, SANT PALLAN, WILLIAM L. PEREIRA & ASSOCIATES, RAWLS ACKER, DON O'BRIEN,

Respondents.

Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Respondent First American Title Insurance Company respectfully opposes the Petition for Issuance of a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

Opinions in the Courts Below.

Respondent accepts Petitioner's statement relating to the opinions below.

Jurisdiction of This Court.

Respondent accepts Petitioner's statement relating to jurisdiction of this Court.

Question Presented for Review.

Was the United States Court of Appeals for the Ninth Circuit correct in ruling that it had no jurisdiction to hear the appeal from the order of the District Court denying class action status to the present case?

Rules and Regulations Involved.

This Petition involves Rule 23 of the Federal Rules of Civil Procedure for the United States District Courts and Sections 1291 and 1292 of Title 28, United States Code. Texts of those rules are set out in the Appendix to this Petition.

Statement of the Case.

The First Amended Complaint in this action was filed on October 20, 1971. On May 18, 1972, prior to any discovery being undertaken, the District Court, pursuant to a motion by plaintiffs, granted an order permitting the case to proceed as a class action. This order was made without prejudice to the defendants' bringing a motion to modify it, or have it withdrawn upon a showing of good cause. No notice of the pendency of a class action, as required by Rule 23 of the Federal Rules of Civil Procedure, was sent out to members of the purported class, and up to the present time, such notice has not been sent.

The plaintiffs in the action were three individuals and one non-profit organization who acquired undivided interests in parcels of real property in the vicinity of the Paso Robles, California, Airport. As part of the marketing program of the undivided interests, the promoters of the project made oral and witten representations over a period of time concerning the property and its ability to be developed into an all-cargo air park.

The purchasers paid forty percent (40%) of the purchase price of their undivided interest as a cash down payment and executed a promissory note secured by a deed of trust for the balance. The deeds of trust securing the balance owed by the purchasers were junior to deeds of trust executed between the promoters and the original holders of the real estate.

Respondent First American Title Insurance Company acted as escrow agent, issued policies of title insurance, and also was nominated as trustee under various deeds of trust.

The Second Amended Complaint, which was filed on August 28, 1972, is framed in seventeen (17) separate counts, with eight of the counts having allegations against respondent First American Title Insurance Company.

These eight counts allege that the promoters' sales activities (1) violated the anti-fraud provisions of Section 17a of the Securities Exchange Act of 1933 (15 U.S.C. Sec. 77q(a)); Section 10b of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78j(b)), and Rule 10b-5 of the Securities Exchange Act; (2) violated the registration and prospectus requirements of Sections 5 and 10 of the Securities Exchange Act of 1933; (3) violated the prohibition against use of a misleading prospectus or oral communication contained in Section 12(2) of the Securities Exchange Act of 1933 (15 U.S.C. Section 771(2)); (4) violated the analogous provisions of the California Corporate Securities Act of 1968 (Cal. Corp. Code Sec. 25000 *et seq.*); (5) violated provisions of the Interstate Land Sale Full Disclosure Act (15 U.S.C. Sec. 1701 *et seq.*); (6) violated provisions of the California Subdivided Land Law

(Cal. Bus. & Prof. Code, Sections 11000 *et seq.*); (7) violated provisions of the California Subdivision Map Act (Cal. Bus. & Prof. Code, Sections 11500 *et seq.*); (8) constituted a common law fraud against the plaintiff; (9) constituted a common law conspiracy to defraud the plaintiffs and (10) constituted a common law conspiracy to violate each and all of the federal and state statutes which plaintiffs allege were violated during the course of Land Data sales activities.

The complaint further alleges that respondent First American aided and abetted the other defendants' violations as set forth in the complaint.

After the Second Amended Complaint was at issue, the parties commenced extensive discovery. On July 8, 1974, there was a thorough evidentiary hearing in the District Court before the Honorable Judge Lydick, held upon motions of defendants First American Title Insurance Company, William A. Pereira and Associates and Adams Properties, for determination that the action should not be maintained as a class action.

On August 20, 1974, the District Court, pursuant to Rule 23, issued its order withdrawing its previous conditional class certification. The court stated in its order:

> "The record *presently* before the court indicates that common questions of law or fact clearly do not predominate over questions affecting only individual members of the alleged class, and that substantial problems of manageability would be encountered if this suit were to proceed as a class action.

> "Accordingly, defendants' motions for a determination that this case may not be maintained as a class action are granted." (Emphasis added).

The plaintiffs filed a Notice of Appeal from that order and also filed a motion to join 172 other claimants as plaintiffs in the action. These 172 people are individuals who executed written retainer agreements with the plaintiffs' counsel. After oral argument, the motion was taken under submission by the Honorable Judge Lydick, who later vacated the submission after the appeal from his order denying class action status was filed.

On July 6, 1976, the Court of Appeals for the Ninth Circuit filed its opinion dismissing the appeal of the plaintiffs from the order of the District Court denying class action status to the case.

ARGUMENT.

I

The Court of Appeals for the Ninth Circuit Correctly Determined That the Order in the Within Action Issued by the District Court Was Not Appealable Under 28 U.S.C. Section 1291, and Said Decision Raises No Issue Warranting Review by This Court.

A. The Order of the District Court Did Not Sound the "Death Knell" of the Action.

As was stated by this court in *Eisen v. Carlisle and Jacqueline, et al.,* 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140:

> "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is in practical consequence but a single controversy."

In the *Eisen* case, *supra,* this court made the observation that:

> "Economic reality dictates that petitioner's suit proceed as a class action or not at all."

The Petitioners' reliance on the *Eisen* case is misplaced because, as the record on appeal to the Court of Appeals clearly documented, economic reality dictates that the case can proceed even though not on a class action basis, *i.e.,* that decertification of the class did not sound the "death knell" of the action.

The Court of Appeals below correctly stated that in various Circuit Court decisions, there has been a

confusion between the "death knell" doctrine and the "collateral order" doctrine. Simply stated, the "death knell" doctrine is that where denial of class action certification would toll the "death knell" of the action because the individual plaintiffs' claim for damages was insufficient to support further proceedings on a non-class basis, then an appeal under 28 U.S.C. Section 1291 would be allowed.

The Petitioners, at pages 5 through 12 of their brief, take issue with the fact that the Court of Appeals held that it would be appropriate to look to the dollar amount of the claim of any class member, as opposed to a named plaintiff, in determining whether a denial of class action status would sound the death knell of the action. It is the Petitioners' position that a determination must be made that such an individual will with a "realistic cognizable probability" prosecute his individual action to final judgment.

The Court of Appeals correctly held that if the plaintiffs were concerned that the case would not proceed at all if it was not a class action, then it was incumbent upon them to demonstrate this fact to the trial court. This was not done.

It is clear that this action is not a case where there are hundreds of unnamed individuals with small claims who may not even have knowledge of the lawsuit. Rather, as the record on appeal clearly documented, there are some members of the class who have investments of over $50,000 and 172 individuals have signed retainer agreements with the attorney for the plaintiffs

and presumably have full knowledge of what is going on with the case. Indeed, a motion to join them has been made in the federal court, and in the companion and almost identical state court action a motion permitting joinder of these individuals has been granted. It should be noted that in the state court case, entitled "Lee, et al. v. Martin, et al." filed in the Superior Court of San Luis Obispo County, California, case number 40651, the court also ruled that the case could not proceed as a class action. That ruling is also being appealed by the named plaintiffs in that case. It is not disputed that the purported classes in the federal and state court actions are identical. It should be noted too that in California the minimal jurisdictional amount of the Superior Court is $5,000.

According to a sworn affidavit of the attorney for the plaintiffs, appearing in the Clerk's Record, page 570, he has retainers from individuals who have invested in the aggregate over $325,000, not including the amounts of the notes outstanding. The fact that these individuals may not at the present time be named plaintiffs has absolutely no bearing on their determination and motivation to proceed with the litigation. Indeed, in plaintiffs' petition to this court at page 9, it is pointed out that the plaintiffs' attorney is representing them on a contingency fee basis. In those cases in which the motivating force behind the class action is the attorney, rather than the named plaintiffs, a strong argument can be made that the only important factor is the size of the potential attorney's fees, and not the size of the named plaintiffs' claims.

B. The "Collateral Order" Doctrine Does Not Permit the Review of the Order Denying Class Action Status in This Case.

In *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949), extensively relied upon by Petitioners, this Court held that a final decision under 28 U.S.C. Section 1291 was not limited to "those final judgments which terminate an action." In *Beneficial Loan*, a stockholders' derivative action was brought against a corporation. Federal jurisdiction was based on diversity. The trial court held that a state statute which required the plaintiffs to give security prior to trial for the expenses reasonably anticipated by the defendant in defense of the action was inapplicable in a federal proceeding. On appeal, the Third Circuit reversed and held the state statute to be applicable to the plaintiff. On *certiorari*, the Supreme Court affirmed, and on the appealability issue held that the order sought to be appealed from

> ". . . appears to fall in that small class which finally determined claims of rights separable from and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. 541 at 546.

In *Beneficial Loan*, therefore, an order relating to whether the plaintiff had to give security for defendants' anticipated expense in defending an action *prior* to

the action going forward was held to be a final decision on that particular matter within the meaning of 28 U.S.C. Section 1291. Needless to say, the background facts of *Beneficial Loan* bears little resemblance to those in the instant case. The issues before the court in *Beneficial Loan* were not those that relate to a class action matter. Additionally, *Beneficial Loan* was decided at a time when there was no interlocutory appeal as is now provided by 28 U.S.C. Section 1292 (b), and this suggests that the *Beneficial Loan* case should be reserved for the exceptional case.

The case of *Eisen v. Carlisle and Jacqueline, supra,* did involve a class action proceeding. There the trial court from the Circuit Court, reversed its earlier order and ordered that an antitrust and securities law action proceed as a class action. In connection therewith, the trial court also entered the further order that inasmuch as two and one-quarter million members of the prospective class could be identified by name and address, and since it would cost $225,000 to send individual notice to all of them, that individual notice would only be sent to a limited number of the prospective class, and that, as to the remainder of the class, there would only be notice by publication. Furthermore, after a preliminary hearing, the trial court determined that the plaintiffs were "more than likely" to prevail at trial and for that reason ordered that the defendants pay 90 percent of the cost of the notification scheme.

Eisen was before the Second Circuit on three occasions. In the so-called *Eisen I,* case, the Second Circuit held that the trial court's initial determination that the action should not proceed as a class action was a final decision under 28 U.S.C. Section 1291. *Eisen v. Carlisle and Jacqueline,* 370 F.2d 119 (2d Cir. 1966). In *Eisen III* the Second Circuit held in effect that the latter order of the trial court granting class action status and the further order concerning notice and requiring prepayment of 90 percent of the notification expense by the defendant was also a final decision under 28 U.S.C. Section 1291. *Eisen v. Carlisle and Jacqueline,* 479 F.2d 1005 (2d Cir. 1973). On *certiorari* this Court on the appealability issue held that the Second Circuit in *Eisen III* had jurisdiction under 28 U.S.C. Section 1291 "to review fully the District Court's resolution of the class action notice problems in this case."

It would appear that in *Eisen v. Carlisle and Jacqueline, supra,* this Court was not so much concerned with the mere order that the case proceed as a class action as it was with that part of the order relating to notice, and even more particularly with that part of the order that saddled the defendant with 90 percent of the notification expense.

The instant case is distinguishable from *Eisen v. Carlisle and Jacqueline, supra* and *Cohen v. Beneficial Loan Corp., supra* because the order sought to be reviewed only denied class action status, and makes

no reference to notice or who must bear the cost of notice. The Ninth Circuit, in the present case, correctly ruled that a denial of class action status is not a collateral order.

II

There Is No Conflict Among the Circuits Warranting Review by This Honorable Court.

Petitioners point out that the Third, Sixth, Seventh and Tenth Circuits "have apparently determined that under no condition will an appeal lie from the denial of class certification." (Petition, p. 4). This is not accurate, for most of the cases cited do not flatly rejectly appealability in general, but rather only because of specific facts involved in the cases. For instance, in the Tenth Circuit case of *Gerstle v. Continental Airlines, Inc.*, 466 F.2d 1374, the court held that an order decertifying an action was interlocutory and not final and appealable, but in so holding noted that under Federal Rules of Civil Procedure, Rule 23(c)(1), an order by a trial court relating to class action status may be conditional and may be altered or changed before decision on its merits. Likewise, the Third Circuit case of *Hackett v. General Host Corporation*, 455 F.2d 618, *cert. denied* 407 U.S. 925 (1972), criticized the "death knell" doctrine but held it to be not applicable in any event where federal statute provides for recovery of attorneys' fees and costs.

It should further be noted that the Third, Sixth and Seventh Circuits decisions cited by Petitioners in their brief at page 4 were all prior to the decision of this Court in *Eisen v. Carlisle and Jacqueline, supra,* in 1974.

III

There Were Procedures Available to Petitioners to Have the Order of the District Court Reviewed Which Petitioners Did Not Pursue.

It should be noted that there were other avenues for appellate review of class action determination. A writ of *mandamus* under 28 U.S.C. Section 1651 may be available to review class action determinations. See *McDonnell Douglas Corporation v. United States District Court*, 20 F.R.S.2d 11 (9th Cir. 1975); *Interspace Corp. v. City of Philadelphia*, 438 F.2d 401 (3d Cir. 1971); *Gold Strike Stamp v. Christiansen*, 436 F.2d 791 (9th Cir. 1970); *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974). This procedure was not used by Petitioners.

Further, interlocutory appeals of class action determinations under 28 U.S.C. Section 1292(b) may be permitted if the statutory requirements are met by either plaintiffs or defendans. *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974), *cert. denied* 419 U.S. 885 (1974) (appeal by defendant permitted); *Zahn v. International Paper Company*, 496 F.2d 1033 (2d Cir. 1972), *aff'd* 414 U.S. 291 (1973) (appeal by plaintiffs permitted); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) (appeal by plaintiff permitted); *Kline v. Coldwell Banker and Company*, 508 F.2d 226 (9th Cir. 1974), *cert. denied* 421 U.S. 963 (1975) (appeal by defendant permitted).

Conclusion.

This Court should deny the Petition for a Writ of Certiorari.

Respondents dispute that there are, as Petitioners contend, two questions worthy of review. The Petitioners

first ask whether the Court may look only to named active class members to determine if any has the requisite financial interest to maintain an individual action in the federal court. Second, they ask whether the right to maintain a class action lawsuit in and of itself is a collateral right which should be allowed an appeal as of right under Section 1291 of Title 28 of the United States Code. Despite their attempts to characterize the issues involved as important, novel and unsettled in a manner demanding this Court's attention, Petitioners have not shown that the Court of Appeal for the Ninth Circuit erred in defining the rights under Title 28, U.S.C. Section 1291. There is no conflict among the circuits warranting review, and clearly the facts before the Court of Appeals were such to make its decision totally correct. There is no need for this Court to review that decision.

Respectfully submitted,

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APPENDIX.

Federal Rules of Civil Procedure.

Rule 23. Class Actions.

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final in-

junctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude

him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the

proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A Class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Title 28, U.S.C.

Section 1291. Final decisions of district courts.—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. (June 25, 1948, c. 646, Sec. 1, 62 Stat. 929; Oct. 31, 1951, c. 655, Sec. 48, 65 Stat. 726; July 7, 1958, P. L. 85-508, Sec. 12(e), 72 Stat. 348.)

Section 1292. Interlocutory decision.—(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(b) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of

Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (June 25, 1948, c. 646, Sec. 1, 62 Stat. 629; Oct. 31, 1951, c. 655, Sec. 49, 65 Stat. 726; July 7, 1958, P. L. 85-508, Sec. 12(e), 72 Stat. 348; Sept. 2, 1958, P. L. 85-919, 72 Stat. 1770.)